HAN HUI HOLDINGS SDN. BHD.

v.

CHUNG KHIAW BANK LTD.

HIGH COURT, KOTA KINABALU
TUAN IAN H.C. CHIN JC.
[SUIT NO. K22-39 OF 1993]
19 MAY 1993

INJUNCTION: Application for interlocutory injunction - Application to restrain defendant from foreclosing on plaintiff's land - Whether there was a serious question to be tried.

EVIDENCE: Introduction of oral evidence to contradict terms of written agreement - Whether permissible - Application of s. 92 Evidence Act 1950.

The plaintiff, a customer of the defendant bank, obtained a loan facility from the defendant the terms of which were reduced in writing. One of the terms was that the facility was repayable on demand and the defendant demanded repayment of the loan. The plaintiff claimed that the manager of the defendant had orally agreed to grant time to the plaintiff to repay and sought an interlocutory injunction to restrain the defendant from proceeding with its application for the sale of certain property, which was held as security, under s. 111 of the Land Code.

Held:

[1] The events since the meeting between the managing director of the plaintiff and the manager of the defendant had overtaken the alleged oral collateral agreement with the result that the plaintiff had, by its board resolution, accepted the loan as per the terms of the letter of offer and whatever previous oral collateral agreement there had been, had as a result thereof been discarded by the plaintiff itself. There was no serious issue to be tried.

[2] The end result of the alleged oral collateral agreement was that the loan was not repayable upon demand which was inconsistent with the provisions of the letter of offer and the charge that the loan be repayable on demand. The plaintiff could not avail itself of proviso (b) of s. 92 of the Evidence Act 1950 and therefore could not introduce oral evidence to prove the alleged oral collateral agreement.

[Plaintiff's application dismissed with costs to be taxed].

Cases referred to:

Tien Ik Sdn. Bhd. & Ors. v. Peter Kuok Khoon Hwong [1993] 1 CLJ 9/[1992] 1 AMR 52 ***(foll)***

Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212 ***(foll)***

Bank Negara Malaysia v. Mohd Ismail [1992] 1 CLJ 627/[1992] 1 MLJ 400 at p. 408 ***(foll)***

Voo Min En v. Leong Chung Fatt [1982] 2 MLJ 241 ***(cit)***

Titford Property Co. Ltd. v. Cannon Street Acceptance Ltd. [1975] Creswell Encyclopaedia of Banking Law p. 71 ***(cit)***

Enshun Properties Sdn. Bhd. & Ors. v. MBF Finance Bhd.[1992] 3 CLJ 1519/ [1992] 2 MLJ 137 ***(cit)***

Legislation referred to:

Land Ordinance, s. 111
Land Rules, Sch. H of r. 14(1) & Sch. I of r. 14(2)
Evidence Act 1950, s. 92

For the plaintiff - Raymond Szetu; M/s. Szetu & Kong
For the defendant - Valentine Willie; M/s. Skinner Lind Willie Wong & Chin

JUDGMENT

Ian H.C. Chin JC:

I. History of Case

This is an application by the plaintiff for an interlocutory injunction to restrain the defendant from proceeding with its application for sale of certain property under s. 111 of the Land Ordinance until 8 February 1994 or the trial of this action, whichever is earlier, and to restrain the defendant from executing or enforcing the order of sale to be made by the Assistant Collector of Land Revenue under s. 111 of the Land Ordinance. The plaintiff, a customer of the defendant bank, had on 6 March 1992 taken out a writ against the defendant suing for certain declarations, injunction and the refund of RM300,000 for the defendant's breach of a collateral agreement. The terms of the alleged collateral agreement consisted of the following alleged oral representations which the defendant's manager (Francis Lee Chin Yong)("Lee") allegedly made to the plaintiff's managing director (Koh Han Fui)("Koh"), viz:

(a) The defendant will support the business activities of the plaintiff by increasing the facilities for overdraft, Letters of Credit, Trust Receipts and Banker's Acceptance to a total limit of RM850,000;

(b) The said facilities will be available for at least 4 years from the first draw down;

(c) The defendant will grant the plaintiff allowance indulgence with respect to amounts which may periodically be slightly in excess of the total limit;
(d) the defendant will give reasonable notice or grant time to the defendant to repay the excess amount.

These allegations were denied by Lee in his affidavit affirmed on 2 April 1993.

II. Facts of Case

I will next set out the undisputed facts of this case which are gleaned from the affidavits filed herein. The plaintiff is a customer of the defendant since 1983 and by November 1989 had an outstanding account at the defendant's Tuaran branch, in the sum of RM16,161.49. Two other entities are also customers of the defendant, Koh personally and Cement and Steel Distributors Sdn. Bhd. ("Cement and Steel") and they had outstanding accounts, respectively, in the sum of RM189,096.00 and RM1,014,722.12, and which latter account was guaranteed by Koh. A meeting then took place, sometime in November 1989, between Koh and Lee regarding the said accounts resulting in various proposals being put forth by Lee and which proposals were thereafter reduced into writing in a 5-page letter dated 23 November 1989 and bearing reference "KKCR/OD/CW/j1-439" ("said letter"). Lee averred that he did not make any of the said representations which I have earlier on set out while Koh in his affidavit says:

> 6. Mr. Francis Lee then suggested that we should both help each other out and suggested increasing the facilities of the plaintiff company and to channel the funds to Cement and Steel and two other accounts noted under paragraph 10 below.
> 7. I did enquire from Mr. Francis Lee whether there will be any risks involved for the plaintiff company. He assured me there is none and that he will continue to support the plaintiff company and will continue as usual to allow reasonable time for the plaintiff to pay should the plaintiff's account be in excess of their limits.
> 8. He further added that he will still be serving at Kota Kinabalu Branch for the next four (4) years and that he has the last say as to whether to recall any banking facilities should that be necessary. On this premise, I agreed to take up the offer to increase the plaintiff's facilities with the defendant to RM850,000.

The proposals of the said letter are, *inter alia*, as follows -

(1) the plaintiff will be given a loan of RM850,000 which the plaintiff's board must sanction;
(2) part, that is RM565,000 ("Overdraft (1)"), of the said loan was to pay off the said outstanding personal account of Koh and of the outstanding account plaintiff with the defendant's Tuaran branch;
(3) a sum of RM300,000 ("Overdraft (2)") of the said loan was to partially satisfy the amount owing by Cement and Steel to the plaintiff;
(4) the outstanding amount under the facility for the Trust Receipts and Banker's Acceptance was not to exceed, at any one time, the sum of RM250,000 and the combined facility for the Letters of Credit, Trust Receipts and Bankers' Acceptance was not to exceed RM285,000;
(5) the loan was to be secured by a charge over a property for RM850,000 and to be guarantee by Koh and other directors of the plaintiff;
(6) the overdraft (1) and (2) were to be repayable on demand;
(7) the terms and conditions of the said facilities were "subject to review and variation from time to time" at the defendant's discretion; and
(8) the plaintiff was, if it accepts the said loan and the terms, to sign and return a duplicate copy of the letter within 14 days of the 23 November 1989.

The plaintiff signed and returned the said letter to the defendant. The sanction of the board of directors of the plaintiff for the said loan was given in a meeting on 4 January 1990, in which meeting 3 directors including Koh were present, and the terms for the said loan were accepted by the plaintiff, by a resolution of its board ("the board resolution"), in the following words:

> 1. The company do accept the banking facilities granted by Chung Khiaw Bank Limited, Kota Kinabalu vide its letter of offer dated 23 November 1989, under reference No. KKCR/OD/CW/j1-439.

2. The terms and conditions of the banking facilities stated in the said letter of offer be complied with.

The charge and the guarantee to secure the loan, both containing provisions for the said loan to be repayable on demand, were also executed. The loan was disbursed and used for the purposes stated in the said letter. Between 1990 and 1992, the plaintiff had on various occasions exceeded the limits but the accounts also showed the plaintiffs made effort, by payment into the account sufficient sums, to keep within the agreed limits . What happened next was a letter dated 6 May 1992 and issued by the advocates for the defendant by which letter the defendant demanded repayment of the amount owing under the loan, amounting to RM823,790.35 within 14 days from 6 May 1992. The plaintiff received this letter of demand only on 28 May 1992. The plaintiff did not make full payment but instead on 29 May 1992 paid into the account a sum of RM11,300 and thus reduced the amount owing under the overdraft to RM564,999.04. Koh thereafter on several occasions, after the said demand for payment, met a Foo Ngee Kee ("Foo"), the area manager and branch manager of the defendant and in the meeting on the 9 February 1993, Koh proposed to repay the loan by monthly sums of RM10,000. The proposal was relayed to the head office of the defendant in Kuala Lumpur. It was while a reply was still being awaited by the Kota Kinabalu branch of the defendant that they received the writ herein on the 11 March 1993. The defendant had on the 8 September 1992 served the statutory demand for payment on the plaintiff pursuant to Schedule H, r. 14(1) of the Land Rules. The plaintiff did not pay within one month. The defendant thereafter applied to the Assistant Collector of Land Revenue for a sale of the land which application was made pursuant to Schedule I of r. 14(2) of the Land Rules. The hearing of the application was held on the 11 March 1993 after a notice of the hearing was served on the plaintiff on the 23 February 1993. The plaintiff after the receipt of the said notice of hearing caused the writ herein to be issued on the 6 March 1993. The plaintiff at the said hearing objected to the application for an order for sale and the matter was thereafter adjourned to the 20 May 1993 for ruling and in the mean time the parties were to prepare written submissions to assist the Assistant Collector of Revenue to come to a decision.

III. The Issues

The defendant's objections to the grant of the injunction are as follows:

(1) the affidavit evidence cannot support the contention of the existence of an collateral agreement ("Issue 1");
(2) the application is misconceived because the defendant had already commenced foreclosure proceedings ("Issue 2"); and
(3) the injunction sought is in effect directed against the Government or the Assistant Collector of Land Revenue ("Issue 3").

IV. Conclusions

In so far as the Statement of Claim is concerned, the parties agreed that it discloses a cause of action, which is breach of an oral collateral agreement. But Counsel for the defendant argued that the evidence produced by the affidavits "rebut" the existence of the alleged oral collateral agreement. I must first remind myself of the legal principles or guidelines pertaining to the investigation of the affidavit evidence in relation to an application for an interim injunction. It is said in the case of *Tien Ik Sdn. Bhd. & 4 Ors. v. Peter Kuok Khoon Hwong* [1992] 1 AMR 52: 445, per Hj. Mohd. Jemuri Serjan, CJ (Borneo), at p. 458, that:

> It is necessary to bear in mind in an application for an interim injunction the Court is not called upon to make any final decision on any question of fact. What is relevantly required at that stage is for the learned Judge to decide on the affidavits available before him that the claim in the originating summons is not frivolous or vexatious; in other words, that there is a serious question to be tried and having so decided he must go to consider the question of balance of convenience. In this regard it is pertinent to quote a passage from Lord Diplock's judgment in *American Cyanamid v. Ethicon* [1975] 1 AER 504 appearing at p. 510 where he said:
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> > It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages

> on the grant of an interlocutory injunction was that it aided the court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing (*Wakefield v. Duke of Buccleuch* [1865] 12 LT 628 at 629. So, unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

Obviously, the learned Chief Justice (Borneo) by citing the passage, which I have just reproduced, from the judgment of Lord Diplock, was mindful of the principle that you do not uncritically accept affidavit evidence and there cannot be any doubt in this regard as Lord Diplock in the case of *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212, at p. 217, said:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

This principle of law was held to be applicable in all cases where a Judge has to decide a case or matter on affidavit evidence. See *Bank Negara Malaysia v. Mohd Ismail* [1992] 1 MLJ 400, at p. 408. Having reminded myself of the guiding principles, I will now proceed to examine critically the evidence produced by the affidavits. It is a term of the said letter that the amount due under the overdraft is repayable on demand. The offers in the said letter were on the 4 January 1990 accepted by the plaintiff by a board resolution and this was followed by the execution of the charge of the property and the execution of the guarantee by the directors of the plaintiff. Every action or inaction and document subsequent to the said letter supported and confirmed the terms of the loan as spelt out in the said letter. It is also not insignificant that neither Koh nor the plaintiff had at any time asserted that there was such an oral collateral agreement, not until the plaintiff took out the foreclosure proceedings. It is significant too that the plaintiff, as recently as the 9 February 1993, made proposals to repay the loan by monthly instalment of RM10,000. There was also another factor, which, unfortunately was not raised by either party and it is this: it is not clear as to when the alleged oral collateral was supposed to come to into existence. The statement of claim does not say so explicitly. If this was supposed to have come into existence in November 1989 as a result of the meeting between Koh and Lee, then the subsequent said letter showed a change of heart on the part of the defendant because all the terms of the alleged oral collateral agreement were not stated in the said letter. There is no evidence that Koh had briefed or informed the other two directors of the plaintiff that there was this oral collateral agreement. Therefore when the board of directors of the plaintiff met on the 4 January 1990 to consider the offer of the defendant, which was contained in the said letter, to increase the loan to the plaintiff, two of the three directors were totally unaware of the alleged oral collateral agreement. The plaintiff had therefore, irrespective of the alleged oral collateral agreement and because two of the three directors who passed the resolution to accept the terms of the said letter were unaware of the said oral collateral agreement, accepted, by a majority of two to one, the said letter and its terms even though the said letter did not incorporate the terms of the collateral agreement. Since this point was not taken by the parties, I would have to disregard it. But even without it and given my discussion of the evidence already had, I am of the conclusion that the plaintiff does not have any real prospect in succeeding in his claim. To sum up, the events since the meeting between Koh and Lee had overtaken the alleged oral collateral agreement with the result that the plaintiff had, by its board resolution, accepted the loan as per the terms of the said letter and whatever previous oral collateral agreement had as a result thereof been discarded by the plaintiff itself. It was additionally argued by Counsel for the defendant that because of the prohibition of the introduction of oral evidence by s. 92 of the Evidence Act, 1950, there is also no serious issue to be tried. The court was referred to the case of *Voo Min En v. Leong Chung Fatt* [1982] 2 MLJ 241. Counsel for the plaintiff argued otherwise and referred to the case of

Titford Property Co. Ltd. v. Cannon Street Acceptance Ltd. [1975] Creswell Encyclopaedia of Banking Law p. 71 and *Enshun Properties Sdn. Bhd. & Ors v. MBF Finance Bhd.* [1992] 2 MLJ 137. Here again I accept the argument of Counsel for the defendant. The alleged terms of the oral collateral agreement (summarised above) which the plaintiff sought to prove are inconsistent with the terms of the said letter and with the terms of the charge. The end result of the alleged oral collateral agreement is that the loan is not repayable upon demand which is inconsistent with the provisions of the said letter and the charge that the loan be repayable on demand. That being the case, the plaintiff cannot avail itself of the proviso (b) of s. 92 of the Evidence Act, 1950, and therefore cannot introduce oral evidence to prove the alleged oral collateral agreement. I do not think *Voo Min En Case* is of help to the defendant because that case concerns an alleged oral agreement which the law requires to be in writing and to be registered which is not the issue here. *Titford Property Co. Ltd. Case* is also of no assistance because the case concerns contradictory written terms in an agreement which is also not the issue here. Similarly *Enshun Properties Sdn. Bhd. Case* is also of no relevance because the issue there was whether a bank could recall a 3 year term loan on demand before the term expires which, again, is not the issue.

Therefore, there is no serious issue to be tried. Given my decision, I dismiss the plaintiff's application with costs to be taxed. Since this conclusion of mine would effectively dispose of the plaintiff's application, I need not consider issue 2 and issue 3 though I would have like to deal with them to do justice to the arguments advanced by Counsel, but time does not permit as the exigency of this matter requires a decision before the 20 May 1993 (after I had heard argument on the 15 May 1993) and because I am in the midst of a drug trafficking trial which was temporarily halted to deal with the application herein.

IN RE SIM AND CHIA

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN JC
[DIVORCE PETITION NO. (33) - 29 OF 1992]
28 MAY 1993

FAMILY LAW: Duties of Court when dealing with matrimonial matters - Court requiring affidavit of means of the parties to be filed - Court also requiring filing of certificate of health of children - Reasons for requirement of additional documents.

The Court required the filing in of additional documents not provided for in the Law Reform (Marriage & Divorce) Act 1976. The learned Judicial Commissioner gave his reasons for the requirement to file in additional documents.

Held:

[1] The Court must never simply order what the parties petition for without first assuring itself that the terms are just, always warning itself that it may happen that one party may have been forced to accept whatever the other party dictates because the party desperately wants a divorce at whatever cost.

[2] The welfare of the child of the marriage is of paramount importance and the affidavit of means was necessary to see how much the parents, both the one who has custody and the one who has not, should contribute in terms of financial provisions for the children of the marriage.

[3] The medical certificate regarding the health of the child was important for if the child was suffering from illness requiring special medical treatment, then special provisions should be made.

[Orders accordingly].

Cases referred to:
Sivanesan v. Shymala [1986] 1 MLJ 400 ***(refd)***
In re Divorce [1984] MLJ 158 at p. 160 ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 83, 94, 96

For the petitioners - Sim Paw Fatt; M/s. Chong & Pang